# THE ATTORNEY GENERAL OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

September 1, 1988

Honorable James E. Nugent
Honorable John Sharp
Honorable Kent Hance
Railroad Commission of Texas
1701 N. Congress
Austin, Texas 78711-2967

Open Records Decision No. 504

Re: Whether information submitted as part of a private company's voluntary pollution-abatement efforts is protected from required public disclosure by sections 3(a)(1), 3(a)(10), and 3(a)(13) of the Texas Open Records Act, article 6252-17a, V.T.C.S. (RQ-1284)

Dear Commissioners:

The Texas Railroad Commission received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for information related to hydrological work performed by Texaco, Incorporated, at its Headlee Gas Processing Plant. The information relates to Texaco's voluntary groundwater pollution-abatement activities. The commission indicates that it has jurisdiction over groundwater pollution connected with the Headlee Plant. The information at issue consists of reports containing groundwater quality assessments, summaries of hydrological work, and numerous maps, graphs, and charts, all prepared as part of Texacos's pollution-abatement activities.

Under the Open Records Act all information held by governmental bodies must be released unless the information falls within one of the act's specific exceptions to disclosure. You ask whether sections 3(a)(1), 3(a)(10), and/or 3(a)(13) protect the information at issue here.

Section 3(a)(13) protects:

> geological and geophysical information and data including maps concerning wells, except information filed in connection with an application or proceeding before any agency or an electric log confidential under Subchapter M, Natural Resources Code.

Section 3(a)(13) protects the commercial value of geological and geophysical information. Open Records Decision No. 479 (1987).

Open Records Decision No. 479 considered the applicability of section 3(a)(13) to the information that is also at issue in your request. Texaco submitted the same information voluntarily to the Texas Water Commission. Open Records Decision No. 479 noted:

> Only two prior decisions of this office apply section 3(a)(13). The first decision, Open Records Decision No. 312 (1982), held that certain geological reports, studies, and evaluations relating to the Lower Colorado River Authority's plans for future lignite mining may be withheld under section 3(a)(13). In Open Records Decision No. 337 (1982), the attorney general addressed the availability of geological information held by the Texas Department of Water Resources that was submitted to assist the department in evaluating the groundwater contamination in the area and in settling upon possible remedial measures. These decisions deemed it unnecessary to 'determine the precise reach' of section 3(a)(13).
>
> Neither of these decisions addressed the fact that section 3(a)(13) protects from disclosure geological information 'except information filed in connection with an application or proceeding before any agency' (emphasis added). This constitutes a very significant exception to section 3(a)(13). The precise reach of this exception to an exception from required disclosure may be difficult to ascertain.

Open Records Decision No. 479 concluded that the information at issue was not subject to an application or proceeding before an agency and was therefore protected by section 3(a)(13). Although Open Records Decision No. 479 correctly summarizes the law, its application of section 3(a)(13) to the documents in question requires reconsideration.

The Texas Legislature based section 3(a)(13) on a similar provision in the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(9). Although federal decisions interpreting exemption 9 of the federal act do not control

interpretation of section 3(a)(13), because section 3(a)(13) is based on exemption 9, the federal decisions provide guidance.

Section 552(b)(9) protects from required disclosure:

> geological and geophysical information and data, including maps, concerning wells.

Exemption 9 was designed to protect from disclosure certain information that is highly valuable to several important industries and that should be kept confidential when contained in governmental records. See S. Rep. No. 813, 89th Cong., 1st Sess., p. 2.

In Reliability of Electric and Gas Service, Opinion No. 687, 51 F.P.C. 464 (Feb. 4, 1974), the Federal Power Commission (FPC) ruled that certain geological information about oil and gas producers' uncommitted gas reserves need not be withheld under federal exemptions 4 or 9. Federal exemption 4, 5 U.S.C. § 552 (b)(4), protects trade secrets and certain commercial information. Its corollary in the Texas Open Records Act is exception 3(a)(10). The commission noted that claiming exemptions 4 and 9 is the privilege of the governmental agency, not of the entity to whom the information relates. 51 F.P.C. at 472. The commission applied a balancing test of whether the public interest in the data outweighs the potential damage to the affected entities' private proprietary interests. 51 F.P.C. at 467. See also Reliability of Electric and Gas Service, Opinion 687-A, 51 F.P.C. 1185, 1186 (April 3, 1974).

In Pennzoil Co. v. Federal Power Commission, 534 F.2d 627 (5th Cir. 1976), a number of oil companies challenged the FPC's decisions to release uncommitted oil and gas reserve information. The court agreed that the act's exemptions are not an absolute bar to disclosure and agreed with the balancing test to be applied under exemption 9. 534 F.2d at 630-32. But the court held that, in that particular case, in balancing public and private interests the FPC should have considered additional factors: 1) whether release of the information would benefit the public in light of the fact that potential competitive harm to the producers could ultimately harm the public and 2) whether alternatives to full disclosure existed. 534 F.2d at 632. Thus, the applicability of exemption 9 depends on 1) whether the federal agency wishes to claim the exemption, 2) whether release of the information would cause damage to private entities' proprietary interests, and 3) whether the public

interest in the information outweighs the damage to private entities' proprietary interests.

The most significant aspect of these decisions is that the FPC and the 5th Circuit apply to exemption 9 the tests applicable under exemptions 4. Exemptions 4 and 9 provide parallel protection for two different categories of information: commercial information (including trade secrets) and geological information. Similarly, sections 3(a)(10) and 3(a)(13) provide parallel protection for commercial information (including trade secrets) and geological information. The similarity of exemption 4 to exemption 9 of the federal act and of exception 3(a)(10) to exception 3(a)(13) of the state act explains the dearth of federal and state decisions under exemption 9 and section 3(a)(13). Most parties attempting to prevent disclosure rely on the more clearly established principles applied under exemption 4 and exception 3(a)(10). Consequently, we believe that the general principles applicable under section 3(a)(10) for commercial information should be applied to the geological data protected under section 3(a)(13) albeit with special consideration of the nature of geological data and the protection traditionally granted to certain geological data in Texas. Your questions regarding the applicability of the sections will be considered together.

Section 3(a)(10) protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Neither Texaco nor the commission shows how the information at issue either constitutes or reveals trade secrets.

The test under section 3(a)(10) for commercial or financial information, like exemption 4 of the federal act, is as follows:

> commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: 1) to impair the Government's ability to obtain necessary information in the future; or 2) to cause substantial harm to the competitive position of the person from whom the information was obtained. (Emphasis deleted.)

Open Records Decision No. 494 (1988) (quoting National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974)); cf. Critical Mass Energy Project v. Nuclear Regulatory Commission, 830 F.2d 278, 286-287 (D.C.

Cir. 1987) (National Parks application of impairment test may not be exclusive). Additionally, the public interest in disclosure must be balanced with the competitive injury to the company in question. Open Records Decision No. 494.

The commission does not claim that release of this information would impair its ability to obtain similar information in the future. Because the commission has the authority to legally require the submission of this information, its ability to obtain the information in the future clearly would not be totally prevented. When the law requires the submission of specific information to a governmental body, the government's ability to obtain the information in the future is not ordinarily "impaired" within the meaning of the impairment test applied under section 3(a)(10). Open Records Decision No. 494 (1988); 203 (1978); 173 (1977).

On the other hand, not every legal obligation to submit information to a governmental body removes totally the government's right to rely on the impairment prong of section 3(a)(10). See Green v. Department of Commerce, 468 F. Supp. 691, 693 (D.D.C. 1979). The fact that information is submitted voluntarily is relevant. See Critical Mass Energy Project v. Nuclear Regulatory Commission, 830 F.2d 278 (D.C. Cir. 1987). For example, in Critical Mass Energy Project the court addressed the availability of reports voluntarily submitted to the Nuclear Regulatory Commission by a utility industry consortium whenever a "significant" safety-related event occurred at a nuclear power plant. 830 F.2d at 280. The court noted that the impairment analysis under exemption 4 should include consideration of whether alternative means of obtaining the information would result in obtaining the same information, i.e., without a decrease in the quality of the reports and therefore in their value to the agency. 830 F.2d at 283-84. Knowledge that a report will be public may temper the candor of the report. See id. The burden, however, is on the party seeking to prevent disclosure to submit detailed factual justification showing how disclosure will impair the government's ability to acquire the same or similar information in the future. 830 F.2d at 283; Artesian Industies v. Department of Health and Human Services, 646 F.Supp. 1004, 1009 (D.D.C. 1986) (quoting Washington Post Company v. Department of Health and Human Services, 690 F.2d 252, 269 (D.C. Cir. 1982)).

The second prong of the section 3(a)(10) test for commercial or financial information is whether release of the information is likely to cause substantial harm to the competitive position of the person or entity that submitted

the information. Open Records Decision No. 494 (1988). This test is of particular importance with regard to geological data protected under section 3(a)(13) because of the importance of the oil and gas industry in Texas. Under Texas law, the right to explore geologically for minerals is a valuable property right entitled to legal protection. Phillips Petroleum Company v. Cowden, 241 F.2d 586, 590 (5th Cir. 1957); Wilson v. Texas Company , 237 S.W.2d 649, 650 (Tex. Civ. App. - Fort Worth 1951, writ ref'd n.r.e.). Release of geological data regarding mineral interests could cause substantial competitive injury. See id. The Texas Legislature intended section 3(a)(13) to protect these interests. The information at issue here, however, relates to the pollution of groundwater by Texaco's refining process. Texaco does not claim that release of the information would reveal information about valuable mineral reserves, nor does it show how release of the information would likely cause substantial harm to its competitive position. Section 3(a)(10) was not intended to protect against potential loss of goodwill, i.e. through threatened adverse publicity. See Sears, Roebuck and Co. v. General Services Administration, 384 F.Supp. 996, 1007 (D.D.C. 1974), aff'd 509 F.2d 527 (1974) (exemption 4 not intended to protect against loss of goodwill).

We have reviewed the information at issue here, information that was also at issue in Open Records Decision No. 479. We recognize that disclosing some remedial efforts undertaken by regulated industries might indirectly reveal trade secrets or protected commercial or geological data. See, e.g., Public Citizen Health Research Group v. Food and Drug Administration, 704 F.2d 1280, 1290-91 (D.C. Cir. 1983) (remanded to consider commercial interest in profit-oriented research regarding safety of intraocular lenses); Save the Dolphins v. United States Department of Commerce, 404 F.Supp. 407 (N.D. Cal. 1975) (film of tuna fishing expedition reviewed to edit out "fishing trade secrets"; bulk of film then released); Sears, Roebuck and Co. v. General Services Administration, 384 F.Supp. 996 (D.D.C. 1974), aff'd 509 F.2d 527 (1974) (employer's affirmative action plan could be withheld only to the extent that it revealed future business expansion plans and the like). The documents at issue here reveal the location of water wells and buildings on the 80-acre Headlee Gas Processing Plant; they discuss the chromium levels in the water wells drilled on the site as pollution testing wells; they mention other substances found in the water wells; and they show water levels in the wells. Neither Texaco nor the commission has shown how release of this information would likely cause any competitive harm, much less substantial competitive harm.

Additionally, there is a substantial public interest in knowing about the pollution of groundwater and the Railroad Commission's efforts to oversee pollution-abatement. Consequently, the information at issue cannot be withheld under sections 3(a)(10) or 3(a)(13). To the extent that Open Records Decision No. 479 determined that specific documents may be withheld under section 3(a)(13), it is overruled.

You also raise section 3(a)(1) which protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." Neither constitutional nor common-law privacy protects the information at issue here, nor have you raised a statute which protects this information.

S U M M A R Y

Sections 3(a)(1), 3(a)(10) and 3(a)(13) of the Texas Open Records Act, article 6252-17a, V.T.C.S., do not protect from required disclosure certain reports containing groundwater quality assessments, summaries of hydrological work, and numerous maps, graphs, and charts, all directly related to Texaco's voluntary pollution-abatement activities when the Texas Railroad Commission does not show how release of the information would impair its ability to obtain the information in the future and neither the commission nor Texaco shows how release of the information would reveal trade secrets or would be likely to cause substantial competitive injury to Texaco or damage to the commercial value of geological data. The result of Open Records Decision No. 479 (1987) is overruled.

Very truly yours,

Jim Mattox

J I M M A T T O X
Attorney General of Texas

MARY KELLER
First Assistant Attorney General

LOU MCCREARY
Executive Assistant Attorney General

JUDGE ZOLLIE STEAKLEY
Special Assistant Attorney General

RICK GILPIN
Chairman, Opinion Committee

JENNIFER S. RIGGS
Chief, Open Government Section
of the Opinion Committee

Prepared by Jennifer S. Riggs
Assistant Attorney General